A

ABDUL GHANI CHE MAT v. PENGERUSI SURUHANJAYA PASUKAN POLIS & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-01(A)-187-06-2015]
21 NOVEMBER 2016

C ***POLICE:*** *Disciplinary proceedings – Dismissal – Establishment of investigation committee – Request for oral hearing – Denial of supply of documents to appellant for preparation of his case – Whether a breach of natural justice – Whether appellant given fair opportunity to present his case – Serious dispute as to facts – Whether proper to decide case against appellant without oral hearing – Whether decision ultra vires art. 135(2) Federal Constitution – Whether decision liable to be*
D *challenged in court – Charges – Whether defective and unsustainable – Public Officers (Conduct and Discipline) Regulations 1993, regs. 37 & 37B*

ADMINISTRATIVE LAW: *Dismissal from service – Dismissal from police force – Disciplinary proceedings – Establishment of investigation committee – Request for oral hearing – Denial of supply of documents to appellant for preparation of his*
E *case – Whether a breach of natural justice – Whether appellant given fair opportunity to present his case – Serious dispute as to facts – Whether proper to decide case against appellant without oral hearing – Whether decision ultra vires art. 135(2) Federal Constitution – Whether decision liable to be challenged in court – Charges – Whether defective and unsustainable – Public Officers (Conduct and*
F *Discipline) Regulations 1993, regs. 37 & 37B*

ADMINISTRATIVE LAW: *Rules of natural justice – Dismissal – Right to be heard – Establishment of investigation committee – Request for oral hearing – Denial of – Whether a breach of natural justice – Whether appellant given fair opportunity to present his case – Whether decision to dismiss appellant ultra vires*
G *art. 135(2) Federal Constitution*

CONSTITUTIONAL LAW: *Public servants – Dismissal – Establishment of investigation committee – Failure to grant oral hearing for appellant to present his case – Whether a breach of natural justice – Whether decision to dismiss appellant*
H *ultra vires art. 135(2) Federal Constitution*

The appellant was a Deputy Superintendent of Police with the Royal Malaysian Police. On 13 September 2011, the appellant was issued with a show cause letter by the second respondent, *ie*, the disciplinary authority, with a view to dismissal or reduction in rank pursuant to reg. 37 of the Public
I Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). The appellant was charged for (i) giving access to his girlfriend of his thumb drive containing classified security information relating to the police force; and (ii) having illicit intercourse with the same girlfriend between February 2008

and December 2009. The appellant's girlfriend lodged the complaint against him which led to the institution of the present disciplinary proceedings. However, *vide* his written representation, the appellant denied the two charges against him. The disciplinary authority found the appellant guilty of both charges and dismissed him with effect from 26 July 2013. Dissatisfied, the appellant filed a judicial review application to quash the decision but was dismissed by the High Court. *Vide* this appeal, the appellant contended, *inter alia*, that (a) there was a breach of natural justice when the disciplinary authority failed to supply him with copies of all documents that he requested for preparing his representation; (b) there was a failure by the disciplinary authority to accede to his request for oral hearing and/or further investigation and/or to set up a committee of investigation and/or to call and examine his witnesses; and (c) the charges were defective, misleading, baseless and unsustainable in law. The third respondent argued that the appellant was given the opportunity to make copies of all relevant documents without any restriction and it was the appellant himself who chose to make copies of only three documents. As for the documents relating to his girlfriend's complaint in the form of a short messaging system (SMS) ('document (d)') and the police report lodged by his girlfriend alleging that he assaulted her ('document (e)'), the appellant alleged that he was only allowed to inspect those documents but was not allowed to make copies of the same.

Held (allowing appeal with costs; setting aside decision of the High Court)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The *audi alteram partem* rule states that a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side's case. The right of hearing is a right to the minimum standard of procedural fairness and must not be confused with the question of whether the officer was actually guilty of the disciplinary offences. In carrying out the disciplinary procedure, natural justice requires that the disciplinary authority must employ means that justify the end rather than the end justifying the means. (paras 12 & 13)

(2) There was an acute conflict of evidence between the appellant and the third respondent. In the face of the contemporaneous documentary evidence, it could not be disputed that the appellant's request to make copies of the two documents had been refused by the disciplinary authority. If indeed the appellant had been allowed to make copies of document (d) and document (e) as claimed by the third respondent, this would have been reflected somewhere in some form of written official communication between the appellant and the disciplinary authority before the disciplinary proceedings started. However, there was none as far as the record goes. (paras 29 & 31)

(3) The circumstances provided enough reason for the disciplinary authority to have allowed the appellant to make copies of the two documents to prepare his representation. It was irrelevant that his request involved only two out of five documents if otherwise the two documents were in fact used against him in the disciplinary proceedings. The law must therefore be allowed to run its course, *ie*, that the breach of natural justice by the disciplinary authority by way of procedural impropriety had vitiated the entire disciplinary proceedings. (para 32)

(4) Regulation 37(5) of the Regulations stipulates that where the appropriate disciplinary authority considers that the case against the officer requires further clarification, it may establish an investigation committee for the purpose of obtaining such further clarification. An exercise of discretion, be it judicial, *quasi*-judicial or purely administrative that affects the rights of the individual, must be exercised reasonably and for a proper purpose. There is no such thing as absolute and unfettered terms in the exercise of such discretion. The legality of the decision was therefore liable to be challenged in a court of law. If it contravenes art. 135(2) of the Federal Constitution, it will be struck down by the court. (paras 34, 45 & 46)

(5) The disciplinary authority was faced with two conflicting sets of facts, documents and evidence, that was the investigation report and the appellant's representation letter which was exculpatory in nature. If an investigation committee had been established pursuant to reg. 37(5) of the Regulations and witnesses called and examined by the committee pursuant to reg. 37B(3), the appellant would have been given the right to cross-examine any of the witnesses on his own behalf. It was only then that a disciplinary committee could come to a fair conclusion between the two versions, upon hearing further evidence. (paras 47 & 48)

(6) Given that the dismissal of a public officer from the service was not a matter to be taken lightly, the finding of guilt under reg. 37(4) of the Regulations without giving the officer an oral hearing when the officer had requested for such oral hearing must be made with the utmost caution and only in plain and obvious cases and where the explanation given by the officer in his letter of representation provides no defence to the charge. It was not to be made where there was a real and serious dispute of facts over the allegations contained in the show cause letter. On the facts, the appellant's request for further investigation to exculpate himself from the charges could not be said to be unreasonable, nor was it overbearing. (paras 49 & 51)

(7) Fairness dictates that an investigation committee ought to have been established pursuant to reg. 37(5) of the Regulations so that a neutral report could be prepared to assist the disciplinary authority in coming to a decision on such serious matter as the dismissal of a public officer.

Indeed, the appellant had informed the disciplinary authority that he had an independent witness to prove that the thumb drive, the subject matter of the first charge, was stolen from him by the complainant. By deciding to summarily dismiss the appellant under reg. 37(4) without according him an oral hearing, the disciplinary authority had in effect denied the appellant of his rights to effectively meet the case against him. This was a clear breach of art. 135(2) of the Federal Constitution. (paras 52, 53 & 56)

(8) The whole process may be cumbersome and time consuming but justice must not be sacrificed on the altar of expediency. The disciplinary authority here had acted unreasonably when it refused to entertain the appellant's request for an oral hearing by establishing an investigation committee. The decision was therefore *ultra vires* art. 135(2) of the Federal Constitution. The finding of guilt against the appellant was reached without strict adherence to the rule against procedural unfairness, which was manifestly unjust to the appellant, given the severity of the punishment that awaited him. In the circumstances, the disciplinary authority had no jurisdiction to commit such error of law. (paras 61 & 66)

(9) The second charge was defective and misleading where it stated that the appellant could be punished for the second charge if he was found guilty of the first charge. It could be construed to mean that his guilt or innocence in respect of the second charge would only be decided if he was found guilty of the first charge. (para 65)

Bahasa Malaysia *Headnotes*

Perayu adalah Timbalan Penguasa Polis yang berkhidmat dengan Polis DiRaja Malaysia. Pada 13 September 2011, responden kedua, iaitu, pihak berkuasa tatatertib, telah mengeluarkan surat tunjuk sebab kepada perayu untuk dibuang kerja atau diturunkan pangkat di bawah per. 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan'). Perayu dipertuduh (i) memberi akses satu *thumb drive* kepada teman wanitanya yang mengandungi maklumat sulit berkenaan pasukan polis; dan (ii) mengadakan hubungan intim dengan teman wanitanya di antara Februari 2008 dan Disember 2009. Prosiding tatatertib terhadap perayu dimulakan berdasarkan aduan yang difailkan oleh teman wanita perayu sendiri. Walau bagaimanapun, melalui representasi bertulisnya, perayu menafikan kedua-dua tuduhan tersebut. Pihak berkuasa tatatertib mendapati perayu bersalah terhadap kedua-dua pertuduhan dan dibuang kerja dari 26 Julai 2013. Tidak berpuas hati, perayu memfailkan permohonan semakan kehakiman untuk membatalkan keputusan pihak berkuasa tatatertib tetapi ditolak oleh Mahkamah Tinggi. Melalui rayuan ini, perayu menghujahkan, antara lain, bahawa (a) terdapat pelanggaran keadilan asasi apabila pihak berkuasa tatatertib gagal membekalkan perayu dengan salinan dokumen-dokumen yang dipohon untuk menyediakan representasinya; (b) pihak

berkuasa tatatertib gagal membenarkan permohonan perayu untuk mengadakan satu pendengaran lisan dan/atau siasatan lanjut dan/atau menubuhkan satu jawatankuasa siasatan dan/atau memeriksa saksi-saksinya; dan (c) pertuduhan-pertuduhan terhadap perayu adalah defektif, mengelirukan, tidak berasas dan tidak boleh dipertahankan di sisi undang-undang. Sebaliknya, responden ketiga menghujahkan bahawa perayu diberi peluang untuk membuat salinan dokumen-dokumen yang relevan tanpa sebarang sekatan dan perayu sendiri memilih hanya tiga dokumen untuk dibuat salinan. Berkenaan dokumen-dokumen berkaitan dengan aduan teman wanitanya dalam bentuk sistem pesanan ringkas (SMS) ('dokumen (d)') dan laporan polis teman wanitanya di mana beliau menuduh perayu telah memukulnya ('dokumen (e)'), perayu menegaskan bahawa dia hanya dibenarkan memeriksa tetapi tidak dibenarkan membuat salinan dokumen-dokumen tersebut.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Peraturan *audi alteram partem* menyatakan bahawa suatu keputusan tidak boleh dikekalkan selagi pihak yang terjejas dengannya diberi peluang adil untuk membentangkan kesnya dan mengetahui dan menjawab kes pihak yang satu lagi. Hak mendengar merupakan hak standard minima bagi keadilan prosedur dan tidak boleh dikelirukan dengan persoalan sama ada pegawai tersebut bersalah atas kesalahan tatatertib. Dalam menjalankan prosedur tatatertib, keadilan asasi mengkehendaki agar pihak berkuasa tatatertib mengguna pakai kaedah yang mewajarkan matlamatnya dan bukan sebaliknya.

(2) Terdapat percanggahan keterangan antara perayu dan responden ketiga. Berdasarkan keterangan dokumentar semasa, tidak boleh dipertikaikan bahawa permintaan perayu untuk membuat salinan dua dokumen tersebut telah ditolak oleh pihak berkuasa tatatertib. Jika perayu dibenarkan membuat salinan dokumen (d) dan dokumen (e) seperti diakui oleh responden ketiga, perkara ini akan direkodkan dalam bentuk bertulis antara perayu dan pihak berkuasa tatatertib sebelum prosiding tatatertib bermula. Walau bagaimanapun, rekod sebegitu tidak dikemukakan.

(3) Keadaan menunjukkan bahawa terdapat alasan mencukupi untuk pihak berkuasa tatatertib membenarkan perayu membuat salinan dua dokumen tersebut untuk menyediakan representasinya. Tidak munasabah perayu hanya meminta dua daripada lima dokumen jika sebaliknya dua dokumen tersebut digunakan terhadap perayu semasa prosiding tatatertib. Maka, pelanggaran keadilan asasi oleh pihak berkuasa tatatertib melalui ketakteraturan prosedur telah membatalkan segala prosiding tatatertib yang diadakan.

(4) Peraturan 37(5) Peraturan-Peraturan memperuntukkan bahawa di mana pihak berkuasa tatatertib memutuskan bahawa kes terhadap seseorang pegawai memerlukan penjelasan lanjut, satu jawatankuasa siasatan boleh ditubuhkan untuk mendapat penjelasan lanjut yang diperlukan. Suatu pelaksanaan budi bicara, sama ada dalam kehakiman, separa kehakiman ataupun pentadbiran sepenuhnya yang menyentuh hak seseorang individu, perlu dilaksanakan dengan munasabah dan untuk tujuan yang berpatutan. Tiada sebarang terma-terma mutlak dan tanpa had untuk melaksanakan budi bicara sebegitu. Maka, kesahan keputusan itu boleh dicabar di mahkamah. Jika keputusan tersebut melanggar per. 135(2) Perlembagaan Persekutuan, maka ia akan dibatalkan oleh mahkamah.

(5) Pihak berkuasa tatatertib berdepan dengan dua fakta, dokumen dan keterangan bercanggah, iaitu, laporan siasatan dan surat representasi perayu di mana dia mengaku tidak bersalah. Jika jawatankuasa siasatan ditubuhkan berikutan per. 37(5) Peraturan-Peraturan dan saksi-saksi dipanggil dan diperiksa oleh jawatankuasa di bawah per. 37B(3), perayu boleh diberi hak untuk memeriksa mana-mana saksi. Selepas mendengar keterangan lanjut, barulah jawatankuasa tatatertib boleh membuat keputusan adil antara dua versi tersebut.

(6) Memandangkan pemecatan seseorang pegawai awam daripada tugasnya tidak boleh diambil secara ringan, penemuan kebersalahan di bawah per. 37(4) Peraturan-Peraturan tanpa memberi peluang untuk pendengaran lisan perlulah dibuat secara berhati-hati dan hanya dalam keadaan jelas dan terang dan di mana penjelasan yang diberi oleh pegawai dalam surat representasinya tidak mempunyai pembelaan atas tuduhan terhadapnya. Ia tidak boleh dibuat di mana terdapat pertikaian fakta serius terhadap tuduhan yang terkandung dalam surat tunjuk sebab. Berdasarkan fakta, permohonan perayu untuk siasatan lanjut untuk menunjukkan ketidakbersalahannya daripada pertuduhan tidak boleh dikatakan sebagai tidak munasabah, ataupun melampaui batasnya.

(7) Keadilan memerlukan jawatankuasa siasatan ditubuhkan berikutan per. 37(5) Peraturan-Peraturan bagi membolehkan laporan neutral disediakan untuk membolehkan pihak berkuasa tatatertib mencapai keputusan bagi perkara serius sebegini berkenaan pemecatan seseorang pegawai awam. Sememangnya, perayu telah memaklumkan pihak berkuasa tatatertib bahawa dia mempunyai seorang saksi bebas untuk membuktikan bahawa *thumb drive*, iaitu subjek perkara pertuduhan pertama, telah dicuri oleh pengadu daripada simpanan perayu. Pihak berkuasa tatatertib menafikan perayu hak untuk mencabar kes terhadapnya dengan memutuskan secara terus untuk memecatnya di bawah per. 37(4) tanpa mengadakan pendengaran lisan. Ini jelas merupakan satu pelanggaran per. 135(2) Perlembagaan Persekutuan.

(8) Keseluruhan proses kelihatan rumit dan mengambil masa tetapi keadilan tidak boleh dikorbankan atas alasan hendak bertindak cepat. Pihak berkuasa tatatertib di sini telah bertindak secara tidak munasabah apabila ia menolak permohonan perayu untuk pendengaran lisan dengan menubuhkan jawatankuasa siasatan. Maka, keputusan tersebut adalah *ultra vires* per. 135(2) Perlembagaan Persekutuan. Penemuan kebersalahan perayu diputuskan tanpa mengikut peraturan ketat terhadap ketidakadilan prosedur, yang tidak adil pada perayu, memandangkan keseriusan hukuman yang diterima olehnya. Dalam keadaan ini, pihak berkuasa tatatertib tidak mempunyai bidang kuasa untuk melakukan kesalahan undang-undang sebegini.

(9) Pertuduhan kedua adalah defektif dan mengelirukan di mana ia menyatakan bahawa perayu boleh dihukum untuk pertuduhan kedua jika didapati bersalah terhadap tuduhan pertama. Ia bermaksud bahawa kesalahan atau ketakbersalahan perayu bagi tuduhan kedua hanya boleh diputuskan jika dia didapati bersalah bagi tuduhan pertama.

Case(s) referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Chai Kok Choi v. Ketua Polis Negara & Ors [2008] 1 CLJ 113 FC ***(refd)***

Kashinath Dikshita v. Union of India AIR 1986 SC 2118 ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(foll)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Mohd Nawi Ya'akub v. P/ACP W Ramasamy, Ketua Cawangan Khas IPK Kelantan & Anor [2009] 1 CLJ 475 CA ***(refd)***

Owi Cheng Ian v. Suruhanjaya Pasukan Polis Diraja Malaysia & Ors [2014] 8 CLJ 559 CA ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

R v. Army Board of the Defence Council, ex p Anderson [1992] QB 169 ***(refd)***

R v. Chief Constable of North Wales Police, ex p Evans [1982] 1 WLR 1155 ***(refd)***

R v. Deputy Industrial Injuries Commissioner, ex p Moore [1965] 1 QB 456 ***(refd)***

R v. The Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(refd)***

Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***

T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***

Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(foll)***

Legislation referred to:
Federal Constitution, arts. 5(1), 135(2)
Penal Code, s. 489C
Public Officers (Conduct and Discipline) Regulations 1993, regs. 37(4), (5), 37B(3)
Rules of Court 2012, O. 53 r. 3

Other source(s) referred to:
Professor MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn

For the appellant - G Subramaniam Nair & Ebrina Zubir; M/s Maniam Nair & Co
For the respondents - Maisarah Juhari; SFC

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Rahman Sebli JCA:

[1] We heard arguments on 4 August 2016 and reserved judgment to a date to be fixed. Having deliberated on the matter, we have reached a unanimous decision. This is our judgment.

[2] First the salient facts. On 13 September 2011, the appellant, a Deputy Superintendent of Police (DSP) with the Royal Malaysian Police and married with six children was issued with a show cause letter by the disciplinary authority, ie, the second respondent with a view to dismissal or reduction in rank pursuant to reg. 37 of the Public Officers (Conduct and Discipline) Regulations 1993 ("the Regulations"). He was at the material time, the officer in charge of the Selama Police District, Perak.

[3] Two charges were preferred against the appellant. The first charge accused him of giving access to his girlfriend of his thumb drive containing classified security information relating to the police force and the second accused him of having illicit intercourse with the same girlfriend between February 2008 and December 2009.

[4] It was also the same girlfriend who lodged the complaint against the appellant that led to the institution of the disciplinary proceedings. The evidence is that, she has a history of mental illness, as shown by the medical report at p. 392 of the appeal record vol. 3 (part C). Page 395 of the same record further shows that on 27 January 2010, she was detained by order of the court for observation at Hospital Permai, Tampoi, Johor Bahru for one month after being charged with an offence under s. 489C of the Penal Code. The entire case against the appellant rested on her complaint.

[5] The appellant was given 21 days to submit a written representation, which he did *vide* letter dated 8 December 2011 after being granted an extension of time. He categorically denied the two charges. He said they were baseless allegations calculated to bring him down.

[6] By the second respondent's letter dated 30 July 2013, the appellant was informed that the disciplinary authority had found him guilty of both charges and that the punishment was dismissal with effect from 26 July 2013. The dismissal would mean that the appellant will be deprived of his livelihood, which the Federal Court in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 interpreted as to fall within the meaning of deprivation of life under art. 5(1) of the Federal Constitution ("the Constitution").

[7] Aggrieved by the decision, the appellant filed for judicial review under O. 53 r. 3 of the Rules of Court 2012 to quash the decision but was dismissed by the High Court, hence the present appeal before us. There were three issues raised by the appellant, namely:

(a) There was a breach of natural justice when the disciplinary authority failed to supply him with copies of all documents that he requested for preparing his representation;

(b) There was a failure by the disciplinary authority to accede to his request for oral hearing and/or for further investigation and/or to set up a committee of investigation and/or to call and examine his witnesses; and

(c) The charges were defective, misleading, baseless and unsustainable in law.

[8] The first two issues concern the right to procedural fairness. The concept is enshrined in art. 135(2) of the Constitution which provides that no member of the public services shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[9] In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 the Federal Court held the view that art. 135(2) of the Constitution and General Order 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ("the General Orders") are in accord with the concept of natural justice and procedural fairness in common law.

[10] The General Orders has been repealed and replaced by the Regulations which we are now dealing with in this appeal. The equivalent provision in the Regulations to General Order 26 of the General Orders is reg. 37 although worded differently.

[11] In *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152 the Federal Court *inter alia* held that the rule of natural justice that no man may be condemned unheard applies to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "*quasi*-judicial" or "administrative" or whether or not the enabling statute makes provision for a hearing.

[12] The *audi alteram partem* (hear the other side) rule states that a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side's case: *R v. Chief Constable of North Wales Police, ex p Evans* [1982] 1 WLR 1155 (HL); *R v. Army Board of the Defence Council, ex p Anderson* [1992] QB 169; *R v. The Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 (HL). Any decision reached in contravention of this rule will be void for being *ultra vires* art. 135(2) of the Constitution.

[13] The right of hearing is a right to the minimum standard of procedural fairness and must not be confused with the question of whether the officer is actually guilty of the disciplinary offences. In carrying out the disciplinary procedure, natural justice requires that the disciplinary authority must employ means that justify the end rather than the end justifying the means. The Machiavellian approach has no place in any disciplinary proceedings under the Regulations.

[14] Natural justice demands fair play and good conscience. In the textbook "*Administrative Law of Malaysia and Singapore*" 3rd edn by Professor MP Jain, the learned author has this to say on the public officer's right to all the material relied upon by the disciplinary authority:

> The general principle is that all the material which is being relied upon by an adjudicating authority for giving its decision against a person should be brought to his notice and he be given an opportunity to comment, criticise, explain or rebut the same. No material should be relied upon against a party without giving him an opportunity of explaining the same. For the right of hearing to be effective, it is necessary that the authority should not rely on any material against a person without appraising him of the same. *The right of hearing may be of little value if the individual is kept in the dark as to the evidence against him and is not given an opportunity to deal with it. The right to know the materials on which the authority is going to take a decision forms part of the right to defend. If without disclosing any evidence to the party, the authority takes the same into consideration, and decides the matter against him, then the decision is vitiated for it amounts to a denial of a real and effective opportunity to the party to meet the case against him*. It means that evidence should not be collected behind the back of the concerned party; if some evidence comes like this, then it must be brought to his attention so that he may explain or controvert the same. The principle of disclosure of evidence to the defendant can be seen working in many court cases.
>
> (emphasis added)

[15] The first issue raised by the appellant relates to the disciplinary authority's reliance on the following five documents to find him guilty of the charges:

(a) The statement of his girlfriend;

(b) The statement of his girlfriend's daughter;

A (c) The statement of his girlfriend's friend;

(d) The complaint by his girlfriend in the form of a short messaging system (SMS); and

(e) The police report lodged by his girlfriend alleging that he assaulted her.

B **[16]** The appellant's complaint is that although he had asked to be provided with all five documents to prepare his representation, he was provided with only three of them. As for the other two documents, he was only allowed to inspect them but not to make copies. The two documents were documents (d) and (e) above. Nor was he supplied with the thumb drive, which he C claimed to have no idea that it contained classified police information.

[17] The appellant's request for the relevant documents is documented in his letter to the second respondent dated 26 September 2011 where he wrote in paras. 2 and 3 as follows:

D 2. Sebagaimana Yang DiHormati Tan Sri sedia maklum saya telah memberi pengakuan penerimaan Surat YDH Tan Sri, Rujukan KDN(R)211/1199/1-202(7) bertarikh 29hb Jun 2011 pada 13hb September 2011 di mana saya dikehendaki membuat satu representasi secara bertulis yang mengandungi alasan-alasan untuk membebaskan diri, yang hendaklah dikemukakan kepada Suruhanjaya Pasukan Polis melalui E Ketua Polis Negara dalam tempoh 21 hari.

3. Oleh yang demikian, saya memohon agar dapat kiranya saya dibekalkan dengan dokumen-dokumen dan keterangan-keterangan yang ada yang menyebabkan saya dituduh. Adalah besar harapan saya kerana ini akan memberi keadilan dalam saya menyediakan representasi saya.

F **[18]** Later in his representation letter dated 8 December 2011, the appellant lamented the decision by the disciplinary authority to only allow him to have sight of the two documents. This was how he expressed his dissatisfaction:

G 14. Saya sebenarnya tidak tahu dan tidak diberikan sebarang akses kepada apa yang sedang dipertuduhkan kepada saya sehinggalah saya menerima Pertuduhan ini. Saya cuma dibekalkan dengan Percakapan Pengadu Chong Guat Kim, Percakapan Loh Mei Tze iaitu anak Pengadu dan Percakapan Saksi Liew Joon Loy @ Michael Liew dan diperlihatkan salinan SMS Pengadu bersabit dakwaan salahlaku saya serta salinan report palsu Pengadu Bukit Mertajam Rpt: 13200/09.

H **[19]** This was however disputed by the respondents through the third respondent who averred in para. 5.3 of his affidavit in opposition dated 21 April 2014 that he had given the appellant the opportunity to make copies of all relevant documents without any restriction. He claimed in para. 5.5 I of the same affidavit that it was the appellant himself who chose to make copies of only three documents and that for documents (d) and (e), it was also his choice to only examine ("meneliti") them instead of making copies.

[20] The appellant denied para. 5.5 of the third respondent's affidavit in reply. In rebuttal, this is what he said in para. 21 of his affidavit in reply dated 9 May 2014:

> 21. Saya merujuk kepada perenggan 5.5 Afidavit Jawapan Responden-Responden (2) dan ingin mengatakan bahawa dalam surat saya yang bertarikh 26.09.2011, saya telah memohon untuk dibekalkan dengan dokumen-dokumen dan keterangan yang ada yang menyebabkan saya dituduh. Tetapi apabila saya dipanggil, saya cuma dibekalkan dengan 3 dokumen dan laporan polis pengadu dan laporan pengadu hanya diperlihatkan seimbas sahaja dan beliau enggan memberi satu salinan dokumen-dokumen tersebut kepada saya walaupun diminta. Tambahan pula, lain-lain dokumen dan keterangan terutamanya 'pendrive' yang dikatakan mengandungi rahsia kerajaan tidak ditunjukkan kepada saya serta isi-isi kandungan tidak diberikan dan ditunjukkan. Justru, saya pun tidak tahu kandungan 'pendrive' tersebut dan sama ada ia sebenar-benarnya mengandungi rahsia kerajaan seperti didakwa.

[21] The point raised is not without precedent. In fact, there is a plethora of authorities that deal with the issue. The *locus classicus* on the *audi alteram partem* rule in the context of Malaysian case law is the decision of the Judicial Committee of the Privy Council in *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169 where it was held that the right to be heard carries with it the right to know what evidence has been given and what statements have been made affecting the public officer, and he must be given a fair opportunity to correct or contradict them.

[22] It was further held by Lord Denning who delivered the judgment of the Judicial Committee that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. He then went on to say:

> The Court will not enquire whether the evidence or representations did work to his prejudice. **Sufficient that they might do so**. The Court will not go into the likelihood of prejudice. **The risk of it is enough**. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. (emphasis added)

[23] The factual context in which the above pronouncements were made is as follows. The report of the board of inquiry which contained a severe condemnation of Inspector Surinder Singh Kanda (the appellant) was sent to the adjudicating officer before he sat to enquire into the charge. But Inspector Surinder Singh Kanda never had the report and never had the opportunity of dealing with it. The board then proceeded to present a most damning indictment against him as an "unscrupulous scoundrel" who had subpoenaed witnesses, both police and civilian to commit perjury.

[24] In *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419; [1990] 3 MLJ 364 the then Supreme Court was dealing with materials relating to the past conduct of the appellant. At p. 425 (CLJ (Rep)); p. 368 (MLJ) Jemuri Serjan SCJ delivering the judgment of the court said:

A

> We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. **What we are saying is that if these materials which have such a damning effect on her case are to be used against her she should be given the right to be heard on them**. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> (emphasis added)

[25] This court in *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302 had occasion to deal with the same issue where it was held that since the officer had requested for the documents, it was the duty of the disciplinary authority to provide him with the documents. We are here dealing with a similar factual situation.

[26] The disciplinary authority is only relieved of such duty where no request for the documents had been made by the officer concerned: See the Federal Court decisions in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008] 1 CLJ 113; [2008] 1 MLJ 725; *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308.

[27] The position in India appears to be in "*pari materia*" with our position, as can be seen from the Supreme Court case of *Kashinath Dikshita v. Union of India* AIR 1986 SC 2118 where Thakkar J delivering the judgment of the court said at pp. 2121 and 2123:

> Page 2121
>
> When a Government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. *And no one facing a departmental enquiry can effectively meet the charges unless copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defence, cross examine the witness, and point out the inconsistencies with a view to show that the allegations are incredible?* It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies **notwithstanding the specific request made by the appellant in this behalf**. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question: "What is the harm in making available the material?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude.

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It is **unjust and unfair** to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges leveled against the Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken.

(emphasis added)

[28] The learned Senior Federal Counsel while accepting as applicable the cases that we referred to above nevertheless submitted that the appellant had no right to the two documents as he had been given the right to view them and even to obtain copies, relying of course on what the third respondent said in his affidavit. According to her, the appellant had never at any time applied for the documents to be "served" on him for the purpose of preparing his representation.

[29] The learned Senior Federal Counsel went on to submit that the appellant had been accorded a pre-hearing right of discovery and had in fact inspected the documents and obtained copies from the respondents. We need to correct this assertion of fact as this is where there is an acute conflict of evidence between the appellant and the third respondent. In fact, the third respondent's claim is contradicted by the contemporaneous documents, specifically the appellant's letter to the secretary of the second respondent dated 8 December 2011 where he complained that he was only allowed to have a look but not to make copies of documents (d) and (e).

[30] Further and in any event, it cannot be correct for the learned Senior Federal Counsel to say that since the appellant had been given the right to view the two documents, he had no further right to the documents. Perhaps, learned counsel was labouring under the impression that "service" of documents is the same as allowing copies to be made. There is of course a difference between merely being shown a document and being given copies or the right to make copies.

[31] In the face of the contemporaneous documentary evidence, we do not think it can be disputed that the appellant's request to make copies of the two documents had been refused by the disciplinary authority. If indeed the appellant had been allowed to make copies of documents (d) and (e) as claimed by the third respondent, this would have been reflected somewhere in some form of written official communication between the appellant and the disciplinary authority before the disciplinary proceedings started. But there was none as far as the record goes.

[32] Clearly, the circumstances provided enough reason for the disciplinary authority to have allowed the appellant to make copies of the two documents to prepare his representation. It is irrelevant that his request involved only two out of five documents if otherwise the two documents were in fact used against him in the disciplinary proceedings. The law must therefore be

allowed to run its course, ie, that the breach of natural justice by the disciplinary authority by way of procedural impropriety had vitiated the entire disciplinary proceedings.

[33] We shall now deal with the second issue, which is the refusal by the disciplinary authority to accede to the appellant's request for an oral hearing and/or for further investigation and/or to set up a committee of investigation and/or to call and examine his witnesses. The reason why the disciplinary authority refused to accord the appellant the right of oral hearing or to form an investigation committee under reg. 37(5) or to allow him to call and examine his witnesses was because it was satisfied that based on the show cause letter and the letter of representation, the appellant had failed to exculpate himself from the charges.

[34] Regulation 37(5) of the Regulations stipulates that where the appropriate disciplinary authority considers that the case against the officer requires further clarification, it may establish an investigation committee for the purpose of obtaining such further clarification. In the present case, the disciplinary proceedings did not proceed to the investigation committee stage as the disciplinary authority decided that the case against the appellant required no further clarification. The disciplinary proceedings stopped at reg. 37(4) which reads:

> (4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

[35] In the context of the present appeal, what the decision under reg. 37(4) means is that the disciplinary authority believed the complainant's allegations and disbelieved the appellant's explanation, hence the finding that the appellant failed to exculpate himself from the charges to the satisfaction of the disciplinary authority.

[36] The learned Senior Federal Counsel submitted that it was the sole discretion of the disciplinary authority to decide whether or not to establish an investigation committee under reg. 37(5), relying on the Federal Court decision in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 where Zaki Tun Azmi PCA (as he then was) delivering the judgment of the court ruled at p. 595:

> [43] I had mentioned in para 22 above, according to GOs 24, 25 and 26, the decision whether to refer to a case to a committee of inquiry is the discretion of the disciplinary authority. In so deciding whether to refer to the committee of inquiry, the disciplinary authority would have to consider the written representation of the respondent ie, whether his written representation exculpated himself from the charges preferred against him.

[37] The above passage must be read together with the next paragraph of the judgment, which reads: A

> [44] From these GOs, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself. The answer to Question (iii) must therefore answered in the negative ie, that it is not for the court but the disciplinary authority who is to decide this question of whether he has exculpated himself by his written representation. B

[38] That is the context in which the passage quoted by the learned Senior Federal Counsel must be understood. From our reading of the judgment in its entirety, what the Federal Court decided on this particular issue was that once the officer had submitted his letter of representation, it was entirely for the disciplinary authority to decide on his guilt or innocence. C

[39] We take this pronouncement to mean just that, ie that the guilt or innocence of the officer is for the disciplinary authority to determine and not for the court. Nothing more should be read into the judgment, certainly not to the effect that the decision by the disciplinary authority not to establish an investigation committee is not open to question in a court of law. Whether or not the decision is open to question in a court of law is a matter that relates to procedural fairness and has nothing to do with the question of guilt or innocence. D E

[40] The decision in *Vickneswary* was discussed in *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465 where the Federal Court was called upon to determine the following question of law: F

> Whether the principle in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi a/l K Perumal* [2001] 2 MLJ 417 (FC) and the case of *Public Services Commission Malaysia & Anor v. Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu deceased)* [2008] 6 MLJ 1 (FC) which states 'the right to be given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing' applies in all cases or whether there are exceptions (to this general rule). G

[41] This is how Zulkefli Ahmad Makinudin FCJ (later CJ Malaya) answered the question posed at p. 468 (CLJ); p. 481 (MLJ): H

> "The position would be that *when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of Order 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Federal Constitution* which states that a reasonable opportunity of being heard be given before any member of such a service could be dismissed or reduced in rank. It would become all the more necessary for the oral hearing or enquiry to be held if there is no evidence to contradict the public officer's exculpatory statement. On this point it is to be stated that oral hearing should be I

A granted when there is a request and when the disciplinary committee is faced with two sets of facts, documents and evidence, that is, the investigation report from the investigating authority and that of the officer's representation letter which is exculpatory in nature. **A disciplinary committee can only come to a fair conclusion between the two (2) versions upon hearing further evidence**.

B

(emphasis added)

[42] Richard Malanjum CJ (Sabah and Sarawak) in expressing his concurrence with Zulkefli Ahmad Makinudin FCJ said at p. 459 (CLJ); p. 473 (MLJ):

C Accordingly I agree with my learned brother Zulkefli bin Ahmad Makinudin FCJ that 'when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of Order 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution ...'. And like my learned brother I too would allow this appeal and grant the relief as given by him.

D

[43] The case was referred to in the Federal Court case of *Tay Chai Huat (supra)* where Arifin Zakaria CJ in agreeing with Mohd Ghazali bin Mohd Yusoff FCJ that the appeal should be allowed on the premise that there was no request from the respondent for the appointment of a committee of inquiry under O. 26(5) of the General Orders made the following observations at p. 585 (CLJ); p. 155 (MLJ):

E

F [2] I should also add that the facts in the present case can be distinguished from that of *Mat Ghaffar bin Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773; [2008] 2 MLJ 1. In that case, there was a request made by the appellant to the disciplinary authority to cross-examine the persons named in the charges proffered against him and for certain documentary evidence to be made available to him, which was denied. Similarly, in the case of *Yusof bin Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465. In that case, the appellant explicitly requested for an oral hearing for the reasons stated in his letter. In both cases, it was held that in the circumstances of the case, an oral hearing ought to have been granted. The above authorities affirmed that if the right to be heard under art 135(2) is to have any real meaning, the circumstances in each case must be fully considered before the court could come to the conclusion whether or not such right has been properly observed by the disciplinary authority (see also *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169).

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H

[44] In *Owi Cheng Ian v. Suruhanjaya Pasukan Polis Diraja Malaysia & Ors* [2014] 8 CLJ 559; [2014] 6 MLJ 695, it was held, *inter alia*, by this court that what amounts to a reasonable opportunity to be heard under art. 135(2) of the Constitution must be determined by the nature of the matter in issue.

I

[45] An exercise of discretion, be it judicial, *quasi*-judicial or purely administrative that affects the rights of the individual, must be exercised reasonably and for a proper purpose. This is trite law. There is no such thing as absolute and unfettered terms in the exercise of such discretion. The point has been driven home authoritatively by Raja Azlan Shah AG CJ (Malaya) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 where his late Royal Highness said at p. 148:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

[46] Thus, while we agree with the learned Senior Federal Counsel that the disciplinary authority is vested with the sole discretion to decide whether or not to establish an Investigation Committee under reg. 37(5) of the Regulations, the caveat is that the discretion must be exercised reasonably and within the parameters of the law. The legality of the decision is therefore liable to be challenged in a court of law. If it contravenes art. 135(2) of the Constitution, it will be struck down by the court.

[47] Applying the law as laid down by the Federal Court in *Yusof Sudin* and *Tay Chai Huat* to the facts of the present case, the question is whether the circumstances facing the disciplinary authority called for an oral hearing, which was requested for by the appellant. On the factual matrix of the case, we must say at the outset that an oral hearing was called for. Here was a case where the disciplinary authority was faced with two conflicting sets of fact, documents and evidence, that is the investigation report and the appellant's representation letter which was exculpatory in nature.

[48] If an investigation committee had been established pursuant to reg. 37(5) and witnesses called and examined by the committee pursuant to reg. 37B(3), the appellant would have been given the right to cross-examine any of the witnesses on his own behalf. It is only then, to borrow Zulkefli Ahmad Makinudin FCJ in *Yusof Sudin*, that a disciplinary committee could come to a fair conclusion between the two versions, upon hearing further evidence.

[49] Given that the dismissal of a public officer from the service is not a matter to be taken lightly as cautioned by Jemuri Serjan SCJ in *Shamsiah Ahmad Sham (supra)*, the finding of guilt under reg. 37(4) without giving the officer an oral hearing when the officer had requested for such oral hearing must be made with the utmost caution and only in plain and obvious cases and where the explanation given by the officer in his letter of representation provides no defence to the charge. It is not to be made where there is a real and serious dispute of facts over the allegations contained in the show cause letter.

[50] Having said that, we are of course mindful of the fact that courts do not impose on the disciplinary authority the technicalities of a court of law in the discharge of its disciplinary functions. These technicalities are in any event not part of the *audi alteram partem* rule. As Lord Diplock said in *R v. Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456 at p. 488:

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising *quasi*-judicial functions must base his decision on evidence means no more than it must be based upon material which tends to logically show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

[51] But we are not here concerned with the technicalities of a court of law. We are here concerned with a simple request by an officer for further investigation and who had expressed his readiness to call and examine his witnesses to exculpate himself from the charges. Having regard to all the circumstances of the case, we cannot say that the request was unreasonable, nor was it overbearing.

[52] In our view, fairness dictates that an investigation committee ought to have been established pursuant to reg. 37(5) in order that a neutral report could be prepared to assist the disciplinary authority in coming to a decision on such serious matter as the dismissal of a public officer. We do not think the case against the appellant was a clear cut case of guilt and therefore fit for summary dismissal under reg. 37(4).

[53] By deciding to summarily dismiss the appellant under reg. 37(4) without according him an oral hearing, the disciplinary authority had in effect denied the appellant of his right to effectively meet the case against him. This was a clear breach of art. 135(2) of the Constitution.

[54] The establishment of an investigation committee under reg. 37(5), apart from giving the appellant the opportunity to present his case orally in accordance with the procedure laid down by reg. 37B, would also have placed the disciplinary authority in a better position to decide if the allegations made by the complainant against the appellant had any basis in fact. For instance, the disciplinary authority would have been given the opportunity to determine if documents (d) and (e), which were not supplied to the appellant but used against him, could withstand scrutiny.

[55] The undisputed evidence is that document (e), which is the police report lodged by the complainant against the appellant, had been 'NFA' by the police, that is to say no further action was taken on the report. In all likelihood, the decision to NFA the report was because it was found to be untrue. Document (e) should not therefore have been used against the appellant in the disciplinary proceedings as there was a real risk that it would cloud the mind of the disciplinary authority in its deliberation.

[56] We have gone through the appellant's explanation in his letter of representation which ran into 35 pages and we do not think that the explanation deserved to be summarily dismissed under reg. 37(4). Indeed, the appellant in his letter of representation had informed the disciplinary authority that he had an independent witness to prove that the thumb drive, the subject matter of the first charge, was stolen from him by the complainant.

[57] The witness had in fact lodged a police report to the effect that the complainant had told him in the presence of his wife that she had stolen the thumb drive from the appellant's desk at Selama, Perak. The claim may or may not be true but that is beside the point that such material conflict of evidence going to the root of the first charge ought to have been placed before the disciplinary authority before it could fairly decide on the fate of the appellant.

[58] This is all the more so when there was no evidence on record to contradict the police report lodged by the witness. The best way to resolve the dispute would have been to establish an investigation committee so that further clarification could be obtained from the appellant or from any other witness or witnesses called at the hearing.

[59] The establishment of an investigation committee was necessary for another reason. The appellant in his letter of representation had complained that the statements of five witnesses whom he had named and whom he claimed could support his defence to the charges were not recorded by the investigating authority within the police force.

[60] We agree that in fairness to the appellant, the statements of these witnesses should have been recorded and placed before the disciplinary authority for its consideration. If an investigation committee had been established, these witnesses could have been called and they could have shed more and perhaps clearer light on the allegations made by the complainant, who obviously had a strained relationship with the appellant.

[61] The whole process may be cumbersome and time-consuming but justice must not be sacrificed on the altar of expediency. On the facts and circumstances of the present case and having given anxious consideration to the matter, we are constrained to conclude that the disciplinary authority, ie,

A the second respondent had acted unreasonably when it refused to entertain the appellant's request for an oral hearing by establishing an investigation committee under reg. 37(5) of the Regulations. The decision is therefore *ultra vires* art. 135(2) of the Constitution.

B **[62]** Last but not least, the third issue of defective charge raised by the appellant. The appellant's contention is that the charges were baseless, defective on the face of it and were totally misleading. His umbrage was with the way the second charge was worded, which was in the following terms:

> ... Jika anda didapati bersalah di atas Pertuduhan Pertama, anda boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ...

C

[63] On this issue, we find the following passage in *Principles of Administrative Law*, 5th edn by MP Jain & SN Jain to be of relevance:

> Further the grounds given in the notice on which the action is proposed to be taken should be couched in clear, specific and unambiguous terms and not in vague or general terms. If these conditions are not satisfied, the person cannot be said to have a reasonable opportunity of being heard. Such a notice is no notice. It amounts to a violation of natural justice, and any consequential proceedings based thereon would be vitiated.
>
> (emphasis added)

D

E

[64] In *Mohd Nawi Ya'akub v. P/ACP W Ramasamy, Ketua Cawangan Khas IPK Kelantan & Anor* [2009] 1 CLJ 475, this court held, on the facts of the case, that a patent error in the framing of the alleged offences in the third, fourth and fifth charges had rendered them bad in law and, consequently, the decision of the adjudicating authority absurd and perverse.

F

[65] We agree that the second charge was defective and misleading in that it stated that the appellant could be punished for the second charge if he was found guilty of the first charge. That could be construed to mean that his guilt or innocence in respect of the second charge would only be decided if he was found guilty of the first charge. We can only say that the second charge could have been more happily worded.

G

[66] Our overall view of the case is that the finding of guilt against the appellant by the disciplinary authority was reached without strict adherence to the rule against procedural unfairness, which was manifestly unjust to the appellant, given the severity of the punishment that awaited him. The disciplinary authority had no jurisdiction to commit such error of law.

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[67] For all the foregoing reasons, the decision of the High Court is set aside and we allow the appeal with costs to be borne by the respondents.

I